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*this corrected brief replaces the earlier brief filed on 8-2-19

No. 96360-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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KING COUNTY,

*Appellant,*

*v.*

KING COUNTY WATER DISTRICT No. 20, *et al.*,

*Respondents,*

and

AMES LAKE WATER ASSOCIATION, *et al.*,

*Intervenor-Respondents.*

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# AMICUS BRIEF OF THE WASHINGTON RURAL ELECTRIC COOPERATIVE ASSOCIATION

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## I. INTRODUCTION

***Turning the Right of Way ("ROW") into a Profit Center—The latest Chapter in an Old Story.*** Starting in the late 19th century, municipalities across the United States discovered a potential new profit center—ROW fees. With the development of new technologies, including electric, gas, and water and sewer and distribution systems, utilities sought to place their facilities in the ROW. Municipalities discovered that they could use their regulatory authority over the ROW to supplement their general revenues by charging non cost-based ROW fees. Since that time, there has been an ongoing effort by municipalities across the country to extract profits from the ROW by charging fees that exceeded regulatory costs. In general, these efforts have been thwarted by legislatures and courts, which have consistently limited ROW fees to the actual cost of regulating the ROW. However, the effort to turn the ROW into a profit center has been persistent and King County's ordinance 18403 is but the latest chapter in this long running effort by local governments to pluck the "golden goose," by turning the ROW into a cash register. Naturally, however, King County utilities, who are the "goose," in this scenario, are not happy about that.

## II. STATEMENT OF THE ISSUES AND OF THE CASE

To avoid needless repetition, WRECA adopts and associates itself with the Statement of Issues in the Brief of Intervenor Respondents, *Ames Lake Water Association, et al.* (hereafter "IRB") at

pages 3-6 thereof, and the Statement of the Case at pages 6-17 thereof and incorporates that those IRB sections herein by reference.

## III. ARGUMENT

WRECA also adopts the Argument section of the IRB, pages 17-50 and incorporates that into this Amicus Brief by reference. *The IRB is a thorough and excellent presentation of the issues and the applicable law in this case and WRECA seeks primarily to supplement that presentation and to add statewide context.*

WRECA agrees with the IRB that King County's argument in its Initial Brief is largely based on "logical sleight of hand," IRB at 21, "rhetorical misdirection," IRB at 22; "on snippets of dicta" rather than the actual holdings of cases, IRB at 29; and on outright "mischaracterization of Washington precedent," IRB at 22. The County was apparently forced to resort to poor reasoning, faulty leaps of logic, mischaracterizations of court decisions and other similar tactics because the County has a bad case and they are simply trying to make the best of it.

**A.** ***King County's Claim.*** King County's claim, when reduced to its essence, is that it owns a "rentable" proprietary interest in the ROW. The County claims it may force utilities to enter into franchise agreements and pay "rent" to place and keep their facilities in the ROW; even though their facilities have often been in the ROW for decades pursuant to dedications, easements and other agreements that do not call for the payment of rent. King County seeks to characterize

the County's proposed franchise fees as a "rental" charge because state law otherwise limits fees charged by municipalities pursuant to their regulatory authority over the ROW to the cost of performing the regulatory activities or providing services to franchisees. Under established caselaw, regulatory fees that exceed the cost of regulation are frequently recharacterized by the courts as "taxes" and if not authorized by state statute are illegal and struck down[1].

However, the County is not interested in just recovering its costs, it admittedly seeks to generate revenues far in excess of its actual cost to administer the ROW. The County acknowledges that those revenues will be used to supplement the County's general fund budgetary needs[2]. The reason the County must call these revenues "rent" as opposed to a "franchise fee" is simple. It would be illegal for the County to collect "fees" that admittedly exceed the cost of regulatory activities or police services provided for a fee. To avoid this illegality the County must characterize its proposed charges as "rent" instead of a "franchise fee."

**B.** ***What is the "right of way?"*** Black's Law Dictionary defines the ROW as "mere easement," not a "fee-simple" property interest, as follows[3]:

> ...[ROW is a] right of passage or of way...[It] is a servitude imposed by law or by convention, and by virtue of which one has a

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[1] See *Okeson v. City of Seattle*, 150 Wn.2d 540; 78 P.3d 1279 (2003), and *Covell v. Seattle*, 127 Wn.2d 874, (1995).
[2] CP 209, lines 3-12, deposition of Dwight Dively.
[3] Black's online Law Dictionary @ https://thelawdictionary.org/right-of-way/

right to pass on foot, or horseback, or in a vehicle, to drive beasts of burden or carts, through the estate of another***.....it is a mere easement in the lands of others,*** *(emphasis added).....* ***It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple*** **of lands to be used for ... any... kind of a way.** [*emphasis added*] [citations omitted].

Thus, the ROW is not a "fee-simple" proprietary interest in property as the County wishes. Moreover, the common definition of "rent" is, "a fixed periodical return ***made by a tenant or occupant of property to the owner*** *(emphasis added)* for the possession and use thereof[4]." Thus, the County seeks to redefine itself as the "owner" of the "right of way," so as to be able to extract "rent" from secondary users of the ROW. But the county is not an "owner" of the ROW, it is merely an agent of the state charged with regulatory and police duties as a trustee for both the state and the public to administer the ROW.

**C.** ***Old Law is Good Law.*** Many of the principles of law applicable to this case are old and have been articulated many times by American courts over the past 150 years. An 1863 New York state case, *People v. Kerr,* 27 N.Y. 188 well describes the general principles that govern state and local authority over the ROW and the delegation of state authority over city and county roads to local government agencies. It is still an accurate description of the derivation of local regulatory authority over the ROW in the U. S., including Washington. In short, local government entities derive their authority over the ROW

[4] https://www.merriam-webster.com/dictionary/rent

exclusively from state constitutions and statutes, i.e. the power to grant franchises is a sovereign governmental power that rests in the state, but may be delegated to municipalities. See *Kerr* at 213, as follows:

> The interest in the use of streets being *publici juris*, [i.e. "of public right"] the power of governing and regulating such uses is vested in the legislature, as the representative of the whole people. It is a part of the governmental or political power of the State, *in no way held in subordination to the municipal corporation*. If the legislature could not authorize the use of the streets in the way prescribed in the act of April, 1860, the power exists nowhere. ... *The city corporation*, as feeholder of the streets, in trust, for public use as highways, *is but an agent of the State. Any control which it exercises over them, or the power of regulating their use, is a mere police or governmental power delegated by the State,* subject to its control and direction, and to be exercised in strict subordination to its will. (*emphasis added*)

There is a long history of court decisions going back to the 19th and early 20th century supporting these principles. See, e.g., *Lerch v. Short*, 185 N.W. 129 (Iowa 1921); And courts have held that streets are required to be reserved for public purposes and may not be transferred to another for a "non-public" purpose. *Sears v. City of Chicago*, 93 N.E. 158 (Ill. 1910) "Whatever title the city has in its streets and other public grounds is held in trust for the public, and this is true whether it owns the fee or only an easement."

In Washington, cities and counties derive their authority to grant utility franchises and to regulate use of the ROW from authority delegated

by the Legislature[5]. The power to grant franchises and administer the ROW is a "regulatory" or "police" power delegated by the state to local government as the agent of the state and as a trustee of the public, not a proprietary interest of the County[6].

**D.** ***King County Has No Proprietary Interest in the ROW.***

The reality is that King County does not "own" a "rentable" property interest in the ROW, it merely manages the ROW pursuant to police and regulatory authority delegated to it by the State Legislature under RCW 36.55.010, and it does so as a trustee for the state and the public and under RCW 36.75.020. Because this regulatory authority is governmental duty and not a proprietary interest in the ROW, the County's "rental" claim must fail; the County cannot rent what it does not own.

But whatever the exact nature of King County's interest in the ROW, it is not a proprietary fee ownership interest in the underlying property, it is a regulatory or police power to administer the ROW delegated to it by the Legislature[7].

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[5] See *General Telephone Co. v. City of Bothell,* 105 Wn.2d 579 (1986); 716 P.2d 879 "The power to grant ***franchises*** is a sovereign power that rests in the state, but which may be delegated to cities...". Counties are delegated authority to regulate the RCW 36.55.010. See *The State of Washington, on the Relation of Dillard D. York et al, 28 Wn.2d 891; 184 P.2d 577; (1947).* See also, *Des Moines v. Iowa Tel. Co., 181 Iowa 1282* (1917) and *Seattle v. W. Union Tel. Co., 21 Wn.2d 838* (1944).

[6] *City of Tukwila v. Seattle* 68 Wn.2d 611 (1966); 414 P.2d 597

[7] *City of Tukwila, supra; and see Bradley v. Spokane & I. E. R. Co., 79 Wash. 455, 140 Pac. 688*, L. R. A. 1917C, 225, appeal dismissed, *241 U.S. 639, 60 L. Ed. 1215, 36 S. Ct. 285*; *Lewis v. Seattle, 174 Wash. 219, 24 P. (2d) 427, 27 P. (2d) 1119.*

***E. The ROW is an "easement-like" Interest.*** The underlying fee ownership interest in ROW remains with the grantor/donor of a ROW subject to the public right to use the ROW[8]. King County has no proprietary interest in the ROW and it's argument that it may charge "rent" for the use of the ROW is based on a misconception or misstatement about the nature of its ownership interest in the ROW. A city or county right-of-way is only an easement for public travel held as a public trustee, see *Kerr, supra*[9]. An easement is a privilege or a right, as distinct from ownership, to use in some way the land of another. Cities and counties generally do not own the property underlying the ROW; the abutting property owners have that fee title, see ftn. 8. While this general rule about the nature of the public right-of-way as an easement is not always clearly set out in state statutes, it is clearly set out in numerous Washington court decisions dating back to territorial days. For example:

- In *Rowe v. James*, 71 Wash. 267, 270 (1912), the state supreme court noted the general rule that "in the absence of a governing statute or a reservation in the grant, the owner of the land on each side of the street owns the fee to the center of the street, subject only to the easement in

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[8] See, e.g., RCW 35.79.040: "Title to vacated street or alley. If any street or alley in any city or town is vacated..., the property...so vacated shall belong to the abutting property owners, one-half to each." See, *Puget Sound Alumni of Kappa Sigma, Inc.*, 70 Wn.2d 222; 422 P.2d 799; 1967 Wash., at 227; "..., The city has nothing to sell in such case. 11 McQuillin, Municipal Corporations §30.189, at 134 (3d rev. ed.) "A municipality is not entitled to compensation for loss of a public easement in streets in which it does not own the fee...the municipality has no...proprietary interest... as to entitle it to compensation."

[9] *Kerr, supra* "...[The ROW] is held the use of streets being *publici juris*, [i.e. "of public right"]...

the public." The court further noted that "We have uniformly held that a city acquires only an easement in a street in consequence of a dedication."

- In *Finch v. Matthews*, 74 Wn.2d 161, 167-68 (1968), the state supreme court explained: "Since *Burmeister v. Howard*, 1 Wash. Terr. 207 (1867), this court has not departed from the rule established in that case, that the fee in a public street or highway remains in the owner of the abutting land, and the public acquires only the right of passage, with powers and privileges necessarily implied in the grant of the easement.

- More recently, in *Kiely v. Graves*, 173 Wn.2d 926, 934 (2012), the state supreme court addressed the dedication of land for a public highway, stating that, "Normally, the interest acquired by the public in land dedicated as a highway is only an easement." *State ex rel. York v. County Bd. of Comm'rs*, 28 Wn.2d 891, 898, 184 P.2d 577 (1947).

- See also, *Washington Real Property Deskbook* § 91.9 (3d ed. 2001): "Any deed to a local government specifically for highway, right of way, or any public purpose could be interpreted as a dedication conveying an easement only. If the intent is to grant a fee interest, that intent should be clearly stated and the use should be unrestricted or, if the use is a condition, the condition should be clearly stated with a specific right of reversion."

### F. *Most of King County ROW was Acquired by Dedication.*

King County is authorized to acquire ROW by various methods, including by statutory or non-statutory dedications, easement, donation, condemnation or purchase. However, King County acknowledges that the "majority" of the ROW managed by the County, was acquired by dedication[10]. When it does so, its interest is as a trustee for the state and the public, not as a fee owner, but as a trustee of the public, see ftn.9. Nevertheless, *to* justify Ordinance 18403, King County asks this Court to

[10] Declaration of King County Road Engineer Rick Brater, at §10, CP 1024.

take a leap of logic and attribute to the County an ownership like "proprietary" interest in county streets and roads, however acquired, as if it were an arena or a park that the county could legitimately lease or rent. The franchise statute, RCW 36.55 is at best silent on the County's claim and certainly provides no explicit authority to impose non cost-based fees.

It is possible for counties to acquire fee title to ROW when a property owner gives or sells fee title to a city or county for use as a ROW with the clear intent to convey fee title (see *Real Property Deskbook §91.9* above), or when a city or county, by exercise of, or by threat of its condemnation (eminent domain) authority, specifically acquires fee title to the property for use as a ROW. However, even when fee title is acquired, the ROW is still held as a public trust and no Washington state or local agency is expressly authorized by law to charge rent for use of the ROW, see ftn. 9.

E.g., although it owns the fee interest in the ROW for state highways, the Department is prohibited by statute from charging franchise fees that are not cost based; see RCW 47.44.020(1). In addition, cities are prohibited from charging non cost-based franchise fees even if they own a fee interest in the ROW. See RCW 35.21.860 and *Lakewood v. Pierce County, 106 Wn. App. 63* (2001) and *Okeson v. City of Seattle*, 150 Wn.2d 540; 78 P.3d 1279 (2003). This is consistent with U.S. law generally[11]. No entity with

[11] See *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895) in which the Mississippi Supreme Court, quoting from Judge Dillon, observed that "...it is a mistake to suppose that when the fee of the streets is in the city, in trust for the public, the city is constitutionally and necessarily entitled to compensation, the same as a private proprietor holding the fee."

authority over the ROW in Washington, even when a fee interest in ROW is acquired, is treated as having a "proprietary," i.e. a rentable "money making" property interest in the ROW.

**G.** ***King County's "Rental" Fee "Impairs" the Rights Secondary Users (Utilities).*** The King County ordinance also ignores the fact that the same ROW dedications that created King County's ROW rights often also created the easements and use rights in favor of third parties, i.e. the utilities, to locate facilities in the ROW. See exhibit 1 to the Declaration of Steven Walter, CP 2016-19, the Plat of Middle Fork Park, a residential development within Tanner's service area[12].

The Middle Fork Plat Dedication goes on to dedicate, "...all streets and avenues...and the use thereof for public highway purposes,... for all public purposes ***including, but not limited to...utilities***." In other words, the very dedication under which King County claims to have acquired its "fee-like" interest in the streets and roads within the Middle Fork Plat, also granted TEC an "easement" to use the ROW without reference to the dedicator or the County having any right to charge "rent" for TEC's use of the ROW or evidence of any intention that rental charges might apply to the

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[12] The Middle Fork Dedication includes the following "Easement Reservations..":

> It is hereby reserved for and granted to Tanner Electric Co-op, [TEC]...and their respective successors under and upon the front seven feet parallel with and adjoining the street...in which to install,...operate and maintain...conduit, cables and wires...for the purpose of serving this subdivision with electric, water, telephone and utility service...

utility's rights. The County, however, asserts that the right of utilities to use dedicated ROW without charge should simply be ignored and the County should be allowed to charge rent to the utilities. If the County is allowed to do so it would "impair" utility contract rights obtained under the Dedication. Those rights have just as much standing as King County's own right to use the ROW for county streets and roadways. I.e., under King County's interpretation, the County may use the ROW for county streets and roads in free of any charge, but somehow the dedication magically gave the County a right to impose a rental charge on utilities to use their rights created by the same dedication. There is simply no basis in the wording in these ROW Dedications from which to derive that the dedicator intended that the County may charge rent to co-grantees under the Dedication. To the same effect, see Plat of RiverSi, Exhibit 2 to the Walter Declaration, CP 220-23.

Utilities throughout King County have rights to use the ROW under similar dedications free of any rental or other non-cost based charge by the County. The terms of these existing dedications, plat easements, donations or other agreements were accepted and approved by King County. Once accepted and approved those terms became contractual and may not be impaired by the County[13] & [14]. Nor may the County force utilities to

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[13] In the case of the Water Districts the right to use the ROW is also specifically embodied in RCW 57.08.005, however, the rights of the non-profit coops and associations embodied in the dedications and other agreements once accepted and adopted by the County also became contractual.

[14] See, *Seattle v. W. Union Tel. Co., 21 Wn.2d 838* (1944) and *Des Moines v. Iowa Tel. Co., 181 Iowa 1282* (1917) cited with approval therein. In *Seattle,* a statute allowed telegraph company to operate in Seattle "...***without compensation being paid for such use to the***

accept payment terms in a franchise contract by adoption of an ordinance over their objection [15] & [16].

**H.** ***Regulatory Authority over the ROW may not be used as a Profit Center.*** The Court in *Kerr, supra,* also well described the general rule that municipalities may not use their regulatory and police powers as a source of general revenues. This rule precludes local

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***state or any of its agencies...".*** In the present case, the utilities have use of the ROW under dedications accepted and approved by the County, **without compensation**. In *Seattle,* the Washington Supreme Court cited with approval the result in *Des Moines.* That case involved a city ordinance like the King County ordinance, that required utilities to pay a **rental fee** for poles and facilities "used, possessed, or maintained upon its streets,...". The City rental fee was struck down as an impairment of the telegraph company's contract rights. In *Seattle,* a state statute allowed Western Union to operate without compensation to the City. The Court held that once Western Union accepted that grant it became part of a contract and could not be impaired by the City's rental fee ordinance.

> ...that respondent accepted such grant by continued operation and maintenance of its lines upon the streets...after the passage of the act; ... by such acceptance, the grant became a contract between the state and respondent, *which could not thereafter be impaired by the state or any of its agencies; that the grant included...the right to operate, construct, and maintain, without compensation,* its lines upon the streets of Seattle... (*emphasis added*)

The utilities' rights to use the ROW in the present case were established by third party dedications accepted and approved by the County, not by statute, however, once accepted they became contractual rights to operate according to the terms of the dedications as accepted and approved by the County. To allow the County to change the terms of those Dedications would impair those utility contract rights.

[15] See *General Tel. Co. of Northwest v. Bothell* 105 Wn.2d 579 (1986), "The city cannot . . . compel the company to accept its terms for the continued occupation of the streets. * * * A city cannot, under the pretense of regulation as an exercise of its police power, force a contract upon the grantee."

[16] See, *Burns v. City of Seattle* 161 Wn.2d 129: "A city has statutory authority to grant a franchise, not to require one. A city cannot compel a utility to accept its terms for the continued occupation of the streets. Thus, generally, a franchise fee is a bargained-for exchange by the franchisee for a privilege that could otherwise be denied to it. Is the fee regulatory or to raise revenue, in which case it is a tax."

governments from using their regulatory authority as a trustee of the ROW as a source of profit. States, including Washington, permit municipalities to regulate the use of streets and to charge fees to recover the costs of regulation; however, municipal regulatory fees, are limited to regulatory costs[17] unless specifically authorized by statute. The rationale for this is explained in *Kerr* at 197-98:

> ***The grant [of authority] is expressly upon trust, for a public purpose,*** that the lands may be appropriated and used forever as public streets. ***The title conferred upon this public agent is wholly for public purposes and not for profit or emolument of the city,...*** The city has neither the right nor the power to apply any such property to other than public uses, and those included within the objects of the grant. Whatever may be the quantity or the quality of the estate of the city of New York in its streets, ***that estate is essentially public and not private property, and the city, in holding it, is the agent and trustee of the public and not a private owner for profit or emolument. (emphasis added)***

**I.** ***Regulatory Fees, are Limited to a Reasonable Approximation of Regulatory Costs.*** Municipal fees, including franchise fees, are generally limited under Washington law to a reasonable approximation of the actual cost of carrying out the regulatory authority. However, the County's "rental" charge bears no relationship to regulatory cost and the County

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[17] See, Pacific Telephone & Telegraph co. Et al. V. City of Everett et al. 97 Wash. 259; 166 P. 650; (1917): License taxes or charges must be reasonably commensurate with the expense of regulation. See also, *Postal Tel.-Cable Co. v. Borough of Taylor*, 192 U.S. 64 (1904) (striking down as excessive fee twenty times higher than costs); *City of Philadelphia v. W. Union Tel. Co.*, 40 F. 615 (C.C.E.D. Pa. 1889) (finding that fee five times the cost of regulation clearly excessive); See also, 9 McQuillin, The Law of Municipal Corporations § 26.17 (3d ed. 1995).

acknowledges that it is intended to supplement its general revenues[18]. Indeed, the Ordinance itself makes it clear that the rental charge is in addition to cost recovery because another element of Ordinance 18403 raises the cost-recovery portion of fees to recover alleged increases in King County's cost to administer the ROW[19]. The utilities do not object to the ordinance to the extent it is limited to costs that are established and verified.

***J. The State Legislature (and Congress in some cases) must specifically authorized certain non cost-based charges.*** To a large extent, the ongoing effort by municipalities to tap ROW fees as a revenue source, here and elsewhere, has been resolved piecemeal by state legislatures. For example, Washington cities sought and obtained authority from the Legislature to impose the Public Utility Tax ("PUT") RCW 82.16; see RCW 35.21.860 and .865 which authorizes cities to assess and collect the PUT. In addition, cable franchise fees (currently 5% of gross revenues from the franchise area) are allowed under federal and state law. However, the PUT and other such non cost-based impositions must be authorized by state or federal law. The difference here is that King County's "rental" charge has not been approved by the Legislature. Indeed, Washington counties, including King County, have repeatedly proposed to the Legislature that

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[18] CP 209, lines 3-12, deposition of Dwight Dively.

[19] See § 8, Declaration of Steven Walter, CP 2014. The King ordinance proposes to substantially increase the cost-based portion fees that it currently charges (e.g. the application fee for a new franchise or a franchise renewal would increase from $2,500 to $12,500. It also increases permit fees, hourly charges for county employees, and other charges would be increased by 3 or 4 times.

counties be allowed to charge the PUT, but the Legislature has repeatedly rejected this proposal[20]. King County's Ordinance 18403, and this lawsuit is effectively an attempted end-run around the Washington Legislature to impose what amounts to a PUT based entirely on a faulty theory of proprietary ownership. The franchise statute, RCW 36.55 is at best silent on the County's claim that a rental charge is allowed and it provides no explicit authority for any non cost-based fees[21].

K. ***No other County has claimed authority to Charge "Rent" unrelated to the Cost of Administering the Franchise.*** The Declaration of Kent Lopez, at § 7, CP 2027, states that he polled his 11 WRECA members to determine if any county in which any of them operate imposes a "rental" charge for use of the ROW and no county does so. The County has acknowledged that this is correct, RP 9-10, cited at IRB, page 31. Finally, the Municipal Research Service Center ("MRSC"), a Washington municipal legal and policy research agency publishes a "Revenue Guide for Washington Cities and Towns" and a separate "Revenue Guide for Counties." The Revenue Guide for Counties at page 165 states, "Franchise

[20] See § 11, Declaration of Kent Lopez, CP 2028-29

[21] King County argues that because the Legislature prohibited cities from imposing non cost based franchise fee without simultaneously prohibiting counties from doing so indicates that the legislature intended to allow counties to impose such fees. WRECA agrees with the IRB that this could equally be interpreted as recognition that counties did not have that authority in the first place. WRECA would also argue that the "rejected proposal rule" applies here. That rule of statutory interpretation posits that proposals rejected by a legislative body should preclude an existing statute (in this case RCW 36.55) from being interpreted to resemble the rejected (in this case PUT) proposal,

fees are generally limited to the recovery of administrative costs,[22]"...and references RCW 36.55 for that statement. King County points to no statute giving ***any unit*** of state or local government authority to use its police or regulatory authority over the ROW to impose fees that exceed the cost of regulation. Nor does King County point to any explicit authority to charge franchise fees based on the ROW land value, or any other explicit authority to turn ROW franchise fees into a "revenue generator."

The question of when a regulatory "fee" or other charge becomes an unlawful "tax" under Washington law is addressed in section IV. J. of the IR Brief at pages 47-50. WRECA adopts and incorporates that discussion herein.

**L.** ***King County Misstates caselaw.*** In the century long saga over ROW fees between municipalities and utilities, very few cases have involved non cost-based fees that are characterized as "rental" charges. A few cases, most notably, *City of St. Louis v. Western Union Telegraph Co.* 148 U.S. 92 (1893) [hereinafter *St. Louis I*] is cited by King County, for the proposition that municipalities may assess non cost-based charges for use of municipal ROW, "in the nature of rent". The County further claims that Washington adopted the "rental" theory in *City of Spokane v. Spokane Gas & Fuel Co.*, 175 Wash. 103, 26 P.2d 1034 (1933). However, the County's brief fails to fully recount the history of *St. Louis I* or the facts and

[22] See MRSC Revenue Guide for Counties, attached hereto as Exhibit 1, to the Merkel Decl..

law on which *St. Louis I* or *Spokane Gas & Fuel* were actually decided. The County's analysis of these cases was incomplete and faulty.

While initially characterizing the fee as "in the nature of rent," on rehearing, the U.S. Supreme Court's opinion in *City of St. Louis v. Western Union Telegraph Co.* 149 U.S. 465 (1893) [hereinafter *St. Louis II*] substantially retreated from its original characterization of the City's fee as "in the nature of rent." In *St. Louis II*, the Court recharacterized the City's authority to charge a fee to place telegraph lines in the streets as being based on its authority to "regulate" the use of streets in the City. The fee charged to Western Union was upheld on rehearing, however, the word "rent" or the phrase, "in the nature of rent" does not appear even once in the *St. Louis II.* Instead, the word "regulate" appears fourteen times in the opinion[23]. Nor did the Court in *St. Louis I* or *St. Louis II* articulate any rationale that the City could charge its fee based on a "proprietary" or "ownership" interest in the ROW. I.e. the "rent" rationale was a vague analogy that was not based on any evidence of an actual proprietary interest of the City. In other words, the Court in *St. Louis II* changed its rationale for upholding the City's fee and based it on regulatory authority over the ROW, not "rental value."

King County's reliance on *St. Louis I* is grounded on this faulty history and a confusing legacy regarding use of the term "rental value" used in *St. Louis I*, but later dropped in *St. Louis II.* The revised "regulatory authority"

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[23] See pages 2-4 of the *St. Louis II* opinion, attached hereto as exhibit 2 to the Merkel Decl.

rationale *St. Louis II,* does not depart significantly from the traditional rule expressed in *Kerr, supra,* and it follows the clear weight of modern authority (including in Washington) that municipalities have no proprietary interest in the ROW; and further, that to be "reasonable" and not excessive, or a defacto "tax," municipal regulatory fees must be an approximate the actual cost of regulation. That is the standard the Washington Legislature adopted for state highways[24] and for cities[25]. See also *FCC Declaratory Ruling and Order 18-133 in WT Docket No. 17-79 and WC Docket No. 17-84* (2018), applicable to the use of state and local ROW by certain telecommunications providers[26].

The County also mischaracterized and misstated the result in *City of Spokane v. Spokane Gas & Fuel Co*[27]. As in *St. Louis I and II,* there is no analysis in *City of Spokane* that indicates the Spokane had a "proprietary" interest in the streets to support its rationale that its fee was akin to "renting" property. Generally, streets must be reserved for only public purposes and

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[24] RCW 47.44

[25] See, RCW 35.21.860(1) & (2). See *City of Lakewood*, and *Okeson* v. *Seattle*, supra.

[26] There is extensive discussion of the "reasonableness" of local regulatory fees in a recent https://docs.fcc.gov/public/attachments/DOC-353962A1.pdf E.g. see paragraph 11 at page 4 of the Order, which reads, in part, "Second, we note, as numerous courts and prior FCC cases have recognized, that state and local fees and other charges .... ***are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs."***

[27] See IRB at p. 24: It [the *Spokane* case] was about whether the city could by ordinance determine the amount of payments owed by a gas company under an existing contract [after it expired]... * * * No issue was raised in that case about whether it was lawful for the city to charge a rental fee for use of the city streets.

municipalities have no right to profit from their streets, unless specifically authorized by the state.

In short, the County has vastly overstated the caselaw supporting its "rental" theory. WRECA members do not object to fees that cover the actual cost of administering and regulating the ROW; however, they do object to the County's intent here to turn the ROW into a profit center[28] or a cash cow.

An irony of this case is that when a city (Lakewood) claimed the right to charge a fee that Pierce County claimed was a revenue generating, non-cost-based fee, the county strenuously objected and filed suit to prohibit the charge. The Court of Appeals held that the franchise fee was, in fact, cost-based and therefore permissible. However, the Court made it clear that a fee that was not cost-based would be an impermissible tax. See *Lakewood v. Pierce County,* 106 Wn. App. 63 (2001) at pp. 75-76.

> ... a "fee" ...[is] not an impermissible "tax" as long as the amount of the fee is limited to Lakewood's costs associated with the County's operation of a sewerage system under Lakewood's streets.

King County's rental charge meets all three criteria of a "tax" under *Lakewood (*and *Covell v. Seattle,* cited in *Lakewood).* It is a brazen attempt by King County, which other counties will almost certainly try to replicate, to create a profit center out of its regulatory responsibility to administer and manage the ROW as a public trustee for the benefit of all authorized users.

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[28] CP 209, lines 3-12, deposition of Dwight Dively

**M.** ***King County's Home Rule Authority Does Not Authorize it to impose a Franchise Rental Fee.*** Due to limitations of space, WRECA adopts the in the IRB at pages 40-44 showing that King County does not have authority by reason of being a Home Rule county to adopt laws on matters of statewide significance, which Ordinance 18403 is; nor does it gain authority by home rule to enact taxes not authorized by state statute[29].

**N.** ***Ordinance 18403 is a matter of statewide significance.*** Public streets and roads are the backbone of our transportation network, but they are also the backbone of utility distribution systems which are just as vital to our communities, perhaps co-equal with transportation. If King County's Ordinance 18403 stands, every Washington county will have authority to adopt a copycat ordinance as a cure for their revenue shortages. The service area map (Ex. 1 to Lopez Decl., CP 230-31), and the data about electric cooperatives in Ex. 2 to the Lopez Declaration, show the statewide financial impact this would have on electric cooperatives[30]. The fact that

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[29] *Chemical Bank v. Washington Public Power Supply System*, 99 Wn.2d 772, 666 P.2d 329 (1983) and *Okeson, supra.*

[30] See Lopez Decl. at §3, CP ____. There are 15 electric cooperatives in Washington with over 163,000 member/consumers in 11 counties state-wide. Washington electric cooperatives provide retail electric distribution service to over 17,594 miles of distribution line. On average, electric cooperatives have more distribution line mileage and far fewer customers per mile of line (9.3) than larger utilities serving urban areas (47.3). A rental charge like King County's, would likely fall more heavily on rural utilities and their consumers because the cost of renting a given length (i.e. square footage) of ROW would be spread over fewer member/consumers. Mr. Lopez estimates that the additional charges to coop member consumers would be over $7.4 million. All of these utilities and all of their 163,000 member/consumers will be vulnerable to the financial impacts of copy-cat ordinances if the King County ordinance is upheld.

the Legislature has previously denied counties PUT taxing authority illustrates why home rule powers extend only to local matters.

## IV. CONCLUSION

Cities and counties manage and regulate the ROW for use roads and streets and for secondary uses, such as utilities; they do not typically own a rentable "fee interest" in ROW property. They hold only own an easement-like interest, as "agents" of the state and "trustees" of the public. No other county or other state agency has claimed authority to rent the ROW or to charge revenue generating fees for the use of the ROW. Ordinance 18403 is based on a misconception and misstatement of the law. Counties do not have a proprietary interest in the ROW that they may "rent" to secondary users. Nor can counties force secondary users to accept terms in a franchise to which they object, such as a rental charge.

The statutes applicable to state highways and city streets clearly prohibit franchise fees in excess of cost. The statute applicable to Counties is at best silent. The ROW is not rentable like a park or meeting hall or an arena that municipalities own in a proprietary capacity. King County points to no statute giving it, or any agency of the state, express authority to impose a non cost-based franchise fee on secondary users of the ROW. King County's rental charge is an illegal tax, not a franchise fee, (*Lakeview* and *Covell,* supra).

Just as troubling, the Ordinance ignores and impairs the rights granted to electric and water cooperatives to use the ROW without a rental charge, which generally derive from the same dedications and other grants under which the County claims it "interest" in the ROW. Such dedications typically do not contain any hint that the grantor intended to require co-grantees to pay rent. Franchises are contracts, negotiated at arms-length, subject to change only upon mutual agreement of the parties. King County Ordinance would change these well-established principles by conditioning the issuance of a franchise on the forced acceptance by utilities what amounts to an unauthorized tax.

If King County wishes to obtain authority to raise additional revenues by charging "rent" that is akin to a tax, it should ask the Legislature for such authority. Tax increases should not be indirectly imposed on the public through litigation using novel and unprecedented statutory interpretations. King County should not be allowed to sidestep the Washington Legislature. The Superior Court's decision herein was correct and it should be upheld.

DATED this 2nd day of August, 2019.

MERKEL LAW OFFICE

Joel C. Merkel, WSBA # 4556
Attorneys for WRECA

DECLARATION

I, Joel C. Merkel, declare under penalty of perjury that the documents attached are true and correct copies of the following:

1. Exhibit 1 to this Declaration is a copy of the cover page and page 165 of the Revenue Guide for Washington Counties published by the Washington Municipal Research Services Center and referenced above herein;

2. Exhibit 2 is a copy of the United States Supreme Court case entitled *City of St. Louis v. Western Union Telegraph Co.,* 149 U.S. 465 (1893) (referenced above herein as *St. Louis II*).

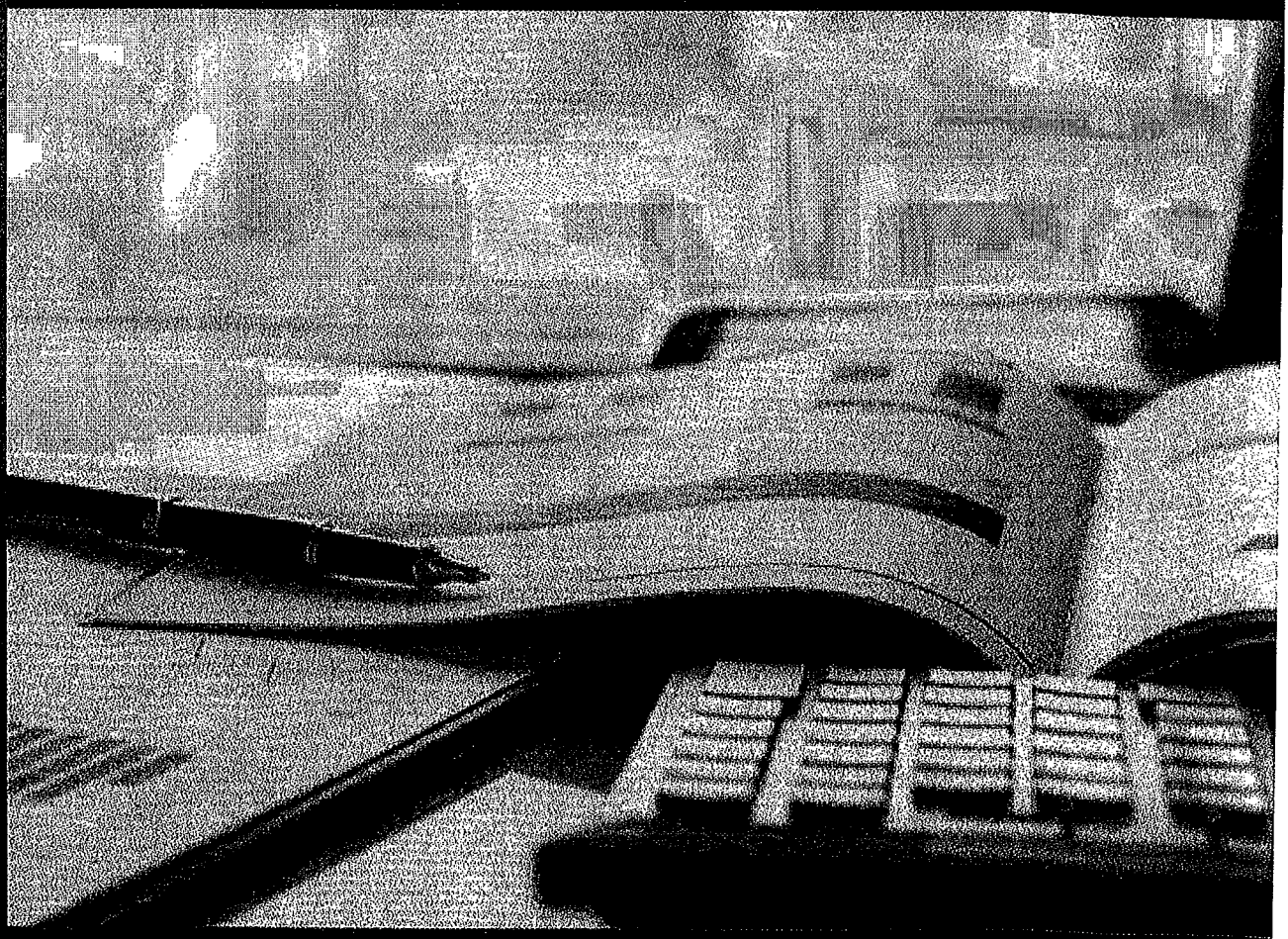
Dated this 2nd day of August, 2019 at Seattle, Washington.

Joel C. Merkel, WSBA 4556

# EXHIBIT 1

# Revenue Guide

## FOR WASHINGTON COUNTIES



MRSC

We will be updating this publication soon to reflect new 2019 legislation impacting county revenues. In particular:

- **ESSB 5272** (increasing E-911 sales tax authority from 0.1% to 0.2%)
- **EHB 1219** (REET 2 expenditures for homeless & affordable housing)
- **SHB 1406** (20-year affordable housing sales tax credit)

Last Updated
**February 2019**

# Other Revenue Sources

## Franchise Fees

**Quick Summary**

- Franchise agreements allow utility providers to install and maintain equipment within county rights-of-way.
- Franchise fees are generally limited to the recovery of administrative costs.
- Exception is cable TV, which may be assessed an annual fee up to 5% of gross revenues.

**RCW: Chapter 36.55 RCW**

Franchise agreements are contracts between the county and public or private utility providers that allow the utility providers to use the county's rights-of-way to deliver their services. A franchise agreement allows the utility provider to install, maintain, and repair utility infrastructure within the right-of-way while minimizing interference with public use of the right-of-way. Typically, these agreements last for 10 to 20 years but may not be for a period longer than 50 years (**RCW 36.55.060**).

**Chapter 36.55 RCW** authorizes counties to grant franchises on county roads and bridges for railways (see **RCW 36.55.030**) and "construction and maintenance of waterworks, gas pipes, telephone, telegraph, and electric light lines, sewers, and any other such facilities" (see **RCW 36.55.010**). The chapter does not specifically address the fees that may be charged for such franchises, but case law suggests that a franchise fee may be imposed to recover costs associated with creation and administration of the franchise.[53]

Cable television franchise agreements are governed by federal law rather than state law and are negotiated with the cable company. Cable TV franchise fees may be levied at a rate up to 5% of gross revenues from the franchise area every year, regardless of the administrative costs (**47 U.S.C. §542**(a) and (b)).

### Use of Revenues

Cable TV franchise fees are unrestricted and may be used for any lawful governmental purpose. All other franchise fees are intended to recover administrative costs only.

53 *See City of Lakewood v. Pierce Cty.*, 106 Wn. App. 63, 23 P.3d 1 (2001).

# EXHIBIT 2

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# ST. LOUIS V WESTERN UNION (1893)

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## United States Supreme Court

## ST. LOUIS V WESTERN UNION (1893)(1893)

## No. 94

## Argued: Decided: May 15, 1893

[149 U.S. 465, 466]. Mr. John F. Dillon, Mr. Rush Taggart and Mr. Elenenious Smith for petitioner.

[149 U.S. 465, 467].

Mr. Justice BREWER delivered the opinion of the court.

In the opinion heretofore announced it was said: 'We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has full control of its streets in this respect, and represents the public in relation thereto.' A petition for a rehearing has been filed, in which it is claimed that the court misunderstood the position of counsel, and, further, that in fact the city of St. Louis has no such control. Leave having been given therefor, briefs on the question whether such control exists have been filed by both sides, that of the telegraph company being quite full and elaborate.

We see no reason to change the views expressed as to the power of the city of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a state is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the state, given in the constitution. Sections 20, 21, art. 9, Const. Mo. 1875, authorized the election of 13 freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to 'become the organic law of the city.' Section 22 provided for amendments, to be made at intervals of not less than two years and upon the approval of three-fifths of the voters. Sections 23 and 25 required the charter and amendments to always be in harmony with and subject to the constitution and laws of Missouri, and gave to the general assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities. In pursuance of these provisions of the constitution a charter was prepared and adopted, and is, therefore, the 'organic law' of the city of St. Lonis, and the powers granted by it, so far as they are in harmony with the constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an or- [149 U.S. 465, 468]. ganic act, so defined in the constitution, and is to be construed as organic acts are construed. The city is in a very just sense an 'imperium in imperio.' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter.

An examination of this charter (2 Rev. St. Mo. 1879, p. 1572 and following) will disclose that very large and general powers are given to the city, but it would unnecessarily prolong this opinion to quote the many sections defining these powers. It must suffice to notice those directly in point. Paragraph 2, 26, art. 3, gives the mayor and assembly power, by ordinance, 'to establish, open, vacate,

alter, widen, extend, pave, or otherwise improve and sprinkle, all streets, avenues, sidewalks, alleys, wharves, and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for the grading, lighting, cleaning, and repairing the same, and to condemn private property for public uses, as provided for in this charter; to construct and keep in repair all bridges, streets, sewers, and drains, and to regulate the use thereof,' etc. The fifth paragraph of the same article grants power 'to license, tax, and regulate . . telegraph companies or corporations, street-railroad cars,' etc. Article 6 treats of public improvements, including the opening of streets. Section 2 provides for condemning private property, and 'for establishing, opening, widening, or altering any street, avenue, alley, wharf, market place, or public square, or route for a sewer or water pipe.' By section 4 commissioners are to be appointed to assess the damages. By section 5 it is made the duty of these commissioners to ascertain the actual value of the land and premises proposed to be taken, and the actual damages done to the property thereby; 'and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be specially benefited by the proposed improvement in the opinion of the commissioners, to the amount that each lot of such owner shall be benefited by the improvement.' Except, therefore, [149 U.S. 465, 469] for the special benefit done to the adjacent property, the city pays out of its treasury for the opening of streets, and this power of the city to open and establish streets, and the duty of paying the damages therefor out of the city treasury, were not created for the first time by this charter, but have been the rule as far back as 1839

Further than that, with the charter was, as authorized by the constitution, a scheme for an enlargement of the boundaries of the city of St. Louis, and an adjustment of the relations consequent thereon between the city and the county. The boundaries were enlarged, and by section 10 of the scheme it was provided:

> 'Sec. 10. All the public buildings, institutions, public parks, and property of every character and description heretofore owned and controlled by the county of St. Louis within the limits as extended, including the courthouse, the county jail, the insane asylum, and the poorhouse, are hereby transferred and made over to the city of St. Louis, and all the right, title, and interest of the county of St. Louis in said property, and in all public roads and highways within the enlarged limits, is hereby vested in the city of St. Louis, and divested out of the county; and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, the city hereby assumes the whole of the existing county debt and the entire park tax.' 2 Rev. St. Mo. 1879, p. 1565.

Obviously, the intent and scope of this charter are to vest in the city a very enlarged control over public property and property devoted to public uses within the territorial limits.

It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word regulate is one of broad import. It is the word used in the federal constitution to define the power of congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply [149 U.S. 465, 470] regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct and expensive boulevard in the city, and then limit the use to vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the state. The law in force in Missouri from 1866 gives certain rights in streets to 'companies organized under the provisions of this article.' Of course, the defendant, a corporation organized under the laws of the state of New York, can claim no benefit of this. It is true that, prior to that time, and by the act of November 17, 1855, (2 Rev. St. Mo. 1855, p. 1520,) the right was given to every telegraph corporation to construct its lines along the highways and public roads; but that was superseded by the legislation of 1866; and when in force it was only a permission, a license, which might be revoked at any tiem; and, further, whatever rights, if any, this defendant may have acquired to continue the use of the streets already occupied at the time of the Revision of 1866, it cannot with any show of reason be contended that it received an irrevocable power to traverse the state, and occupy any other streets and highways.

Neither have we found in the various decisions of the courts of Missouri, to which our attention has been called, any denial of the power of the city in this respect. It is true, true, in Glasgow v. St. Louis, 87 Mo. 678; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. Rep. 130; Glaessner v. Association, 100 Mo. [149 U.S. 465, 471] 508, 13 S. W. Rep. 707; and Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. Rep. 822, -the power of the city to devote the streets or public grounds to purely private uses was denied; but in the cases of Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258, and City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. Rep. 197,-it was expressly held that the use of the streets for telephone poles was not a private use, (and of course telegraph poles stand on the same footing,) and that a private corporation carrying on the public service of transportation of messages might be permitted to use the streets for its poles. Counsel rely strongly upon the latter of these cases, in which the power of the city to regulate the charges for telephone service was denied. But obviously that decision does not cover this case. The relations of a telephone or telegraph company to its patrons, after the use of the streets has been granted, do not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons; but what the company shall pay to the city for the use is directly involved in a regulation of the use. The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. The very argument made by the court to show that fixing telephone charges is not a regulation of the use is persuasive that fixing a price for the use is such a regulation. Counsel also refer to the case of Atlantic & P. R. Co. v. St. Louis, 66 Mos. 228, but there is nothing in that case which throws any light upon this. In that it appeared that there was an act of the legislature giving to the railroad company a specific right in respect to the construction of a track within the city limits, and it was held that the company was entitled to the benefit of that act, and to claim the right given by the general assembly, although it had after the passage of the act proceeded in the construction of the track under an ordinance of the city purporting to give it the privilege. But, as we have seen, the act of November 17, 1855, vested in defendant no general and irrevocable power to occupy the streets in [149 U.S. 465, 472] any city in the state through all time. We find nothing, therefore, in the cases cited from the Missouri courts which militates with the conclusions we have drawn as to the power of the city in this respect.

One other matter deserves notice: It will be seen by referring to our former opinion that one of the contentions of the counsel for the telegraph company was that by ordinance No. 11,604 the city had contracted with the company to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm free of charge. We quote this statement of counsel's claim from their brief: 'Ordinance 11, 604 granted defendant authority to set its poles in the streets of the city without any limitation as to time, for valuable considerations stipulated; and having been accepted and acted on by defendant, and all its conditions complied with, and the city having acquired valuable rights and privileges thereunder, said ordinance and its acceptance constitute a contract, which the city cannot alter in its essential terms without the consent of defendant; nor can it impose new and burdensome considerations.' And in respect to this, further on, they say: 'No question is or can be raised as to the validity of the contract made by ordinance No. 11,604, and its acceptance.' But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a consideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city has such control over the use of the streets as enables it to demand pay therefor?

The petition for a rehearing is denied.

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**Comments:**

This is a corrected version of the original WRECA Amicus Brief filed earlier today from which page 21 was inadvertently omitted.

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